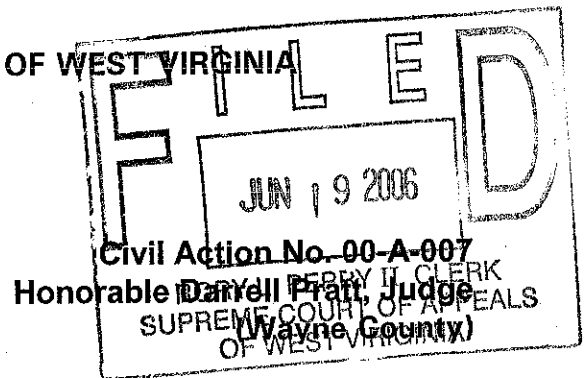


NO. 33079
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE MATTER OF THE ADOPTION
OF JAMISON NICHOLAS C. BY
CHARLES M. AND TWILA M.



BRIEF OF APPELLANT

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**IN THE MATTER OF THE ADOPTION
OF JAMISON NICHOLAS C. BY
CHARLES M. AND TWILA M.**

**Civil Action No. 00-A-007
Honorable Darrell Pratt, Judge
(Wayne County)**

BRIEF OF APPELLANT

I.

STATEMENT OF THE CASE

By Order of the Circuit Court of Wayne County, West Virginia, dated December 5, 2005, Appellant the West Virginia Department of Health and Human Resources (hereinafter "Appellant") was ordered to reopen the private adoption of the Appellee Jamison Nicholas C. (now M.) (hereinafter "Jamison") in order that the Appellant and Jamison's grandparents Charles and Twila M. (hereinafter "Appellee's") could enter into an adoption assistance agreement for medical assistance only. This appeal is predicated in the Circuit Court's Order.

II. FACTS

On September 9, 1998, Crystal C. died leaving behind Jamison, who was two (2) years of age at the time. (Application and Order Ratifying Emergency Custody). At the time of his mother's death, Jamison was residing with the Appellees. *Id.*

On September 9, 1998, the Appellant filed a Petition for emergency custody of Jamison, stating that he was in imminent danger due to his mother's death and his father's status as a fugitive from justice. *Id.* at 2. In addition, the Appellant cited that domestic violence had been present in the marriage of his parents. *Id.* The Circuit Court accepted the Petition and found probable cause to believe that an emergency situation existed. The Circuit Court ratified the emergency custody on behalf of Jamison and gave legal custody to the Appellant, while physical custody remained with the grandparents. *Id.*

On September 18, 1998, the Circuit Court placed full legal and physical custody of Jamison with the Appellee's, rescinding the September 9, 1998, Order giving the Appellant custody. (September 18, 1998 Order, pp. 2-3.) The matter was then dismissed from the Court's docket and no reviews of Jamison's placement occurred, as he was no longer in the State's custody. *Id.* During the time that Jamison was in the Appellant's custody, he displayed no "special needs". (Letter from Thomas D. Linz, Ph.D., Marshall University Psychiatric Associates dated April 1, 2004).

On September 19, 2000, the parental rights of Jamison's biological father, Clyde C., Jr. were terminated (September 19, 2000, Order). The Appellant was not a party to this action. *Id.*

In 2000, Jamison was adopted by the Appellee's. Again, the Appellant was not a party to this action. (Order dated October 13, 2000).

Between September 18, 1998, and June 1999, Jamison had medical coverage through the federally regulated Medicaid Program, under the Caretaker Relative program. He qualified for the program, as he was living in the home of a blood relative and he met the income requirements.

In June 1999 Jamison was approved for Social Security Insurance (hereinafter "SSI"). Because he had yet to be adopted, only his income was used in determining whether or not he qualified for Medicaid benefits.

In January, 2002, Jamison lost his Medicaid benefits due to his adoption. Family income was a factor and the household income exceeded the SSI allowable amount. Following the termination of his Medicaid benefits, Jamison began receiving health insurance through the State run Childrens Health Insurance Program (hereinafter "CHIP"). In February 2004, the household income exceeded that allowed by CHIP, and Jamison lost his coverage. (West Virginia DHHR Proposed Findings of Fact and Conclusions of Law, Exhibit B). The Appellee's filed a request for a fair hearing and, according to the Appellant's policy related to the filing for a fair hearing, coverage was continued pending the outcome. Jamison continues to receive insurance benefits through CHIP pending the conclusion of this appeal.

III. ARGUMENT

THE TRIAL COURT ERRED WHEN IT REQUIRED THE APPELLANT TO ENTER INTO AN ADOPTION ASSISTANCE AGREEMENT WHEN NOT A PARTY TO A PRIVATE ADOPTION.

The *Adoption Assistance and Child Welfare Act of 1980* created the first federal Adoption Assistance Program under Title IV-E. (Pub. L. 96-272). Legislative history indicates that Congress was primarily concerned with moving children in state foster care systems into permanent adoptive homes. The Title IV-E Adoption Assistance Program was developed to provide permanency for children in public foster care with special needs. (*Adoption Assistance and Child Welfare Act of 1980* - Conference Report. Cong. R.

S.6936-6945 (1980). Further, West Virginia Code § 49-2-17 states in part that "[A]n adoption subsidy shall be available for children who are legally free for adoption and who are dependents of the department or a child welfare agency licensed to place children for adoption." (*Emphasis added*) (2004 Repl Vol.). An adoption subsidy can consist of special services, monetary payment, or a combination of both. *Id.*

The Appellant does not contest that Jamison is a child with significant physical and psychological disorders. He suffers from Asperger's Disorder and has some learning problems that require him to be enrolled in special education classes. (Letter from Thomas D. Linz, Ph.D., Marshall University Psychiatric Associates). In addition, Jamison has been diagnosed with depressive disorder, which was classified as non-specific (hereinafter "NOS") and Attention Deficit Hyperactivity Disorder (hereinafter "ADHD"). (Letter from Debra Shultz, M.D., United Health Professionals). What the Appellant does contest is that Jamison was in the State's custody at the time of the adoption. Absent this, he is not entitled to any adoption assistance, regardless of his medical problems. Both the Federal Adoption Assistance Program, as well as the West Virginia Code are explicit when they address assistance in an adoption, that the assistance is to help children in public foster care.

Jamison spent nine (9) days in the legal and physical custody of the Appellant. During that time, he remained in the physical custody of the Appellees. (Application and Order Ratifying Emergency Custody.) Following the end of this nine (9) days, legal custody of Jamison was granted to the Appellee's (September 18, 1998 Order, pp. 2-3). As indicated by the 126 Cong. Rec. S. 6936-6945 (1980), the purpose of the Adoption

Assistance Program was to help difficult to place foster children. Jamison was never a foster child within the true meaning of the Adoption Assistance program.

In its December 5, 2005 Order, the lower court found that Jamison became a 'ward' of the State of West Virginia when he was placed in the temporary custody of the Appellant, an order in direct conflict with the September 18, 1998, Order. (December 5, 2005, Order p. 4). In the September 18, 1998, Order, the lower court stated, with sufficient specificity,

"[T]emporary legal custody previously granted to the West Virginia Department of Health and Human Resources of Jamison Nicholas . . . shall hereby be rescinded and the legal custody, control and care of Jamison Nicholas . . . shall be granted to Charles and Twila . . . , the maternal grandparents. This matter shall be dismissed and stricken from the Court's docket."

(pp. 2-3).

The West Virginia Code does not define the term 'ward', however, the Merriam-Webster Dictionary defines it as . . . "a person who by reason of incapacity (as minority or lunacy) is under the protection of a court either directly or through a guardian appointed by the court." (www.m-w.com/dictionary/ward). According to the Appellant's Policy a state ward exists when one parent's parental rights have been terminated. (See West Virginia DHHR Foster Care Policy, Section 1/15, Republished 6/30/05.) During the limited time Jamison was in the Appellant's temporary custody, his father's parental rights had not been terminated. At no point after legal and physical custody of Jamison was given to the Appellee's was the Appellant involved in legal action involving Jamison. No review hearings related to the abuse and neglect action, aside from the termination hearing that the Appellant was not a party too, were required by the lower court. No family case plan

was required to be filed by the Appellant. The lack of action by the lower court in fulfilling its statutory requirements, such as the family case plan, would indicate that Jamison was not a 'ward' of the State.

The Federal Adoption Assistance Program requires that for an eligible child to receive the subsidy, an adoption assistance agreement must be signed and in effect at the time of or prior to the final decree of adoption. (45 C.F.R. § 1356.40(b)). In addition, West Virginia Code § 49-2-17 states in part that "[T]he department shall provide assistance in the form of subsidies . . . but before the final decree of adoption . . . there must be a written agreement between the family entering into the subsidized adoption or legal guardian and the department. (*Emphasis added*) (2004 Repl. Vol.). No such agreement ever existed between the Appellee's and the Appellant, a fact reinforced by the lower court which stated: "[T]here was never a signed adoption assistance agreement between the Appellant and the grandparents [sic]." (December 5, 2005, Order, p. 4). Therefore, even though the lower court incorrectly found that Jamison was a ward of the State, absent a signed agreement he still would have been ineligible for the subsidy.

The lower court attempted to rectify the problem created by the lack of a signed agreement by incorrectly relying on the U.S. District Court's decision in *Ferdinand v. Department for Children and Their Families*, 768 F. Supp. 401 (1991). In that case, a child was adopted through the Rhode Island Department for Children and Their Families, (hereinafter "RIDCF"). At the time of the adoption, the adoptive parents waived any adoption assistance. Due to a change in the family's circumstances, they later requested a subsidy from RIDCF, which was denied. The Court found that RIDCF had failed to adequately explain the adoption subsidy and that this constituted extenuating

circumstances allowing the case to be reopened. *Id* at 403. Further, the Court found that RIDCF had an affirmative duty to explain all available assistance programs so that potential adoptive families could make an informed decision. *Id* at 404.

The case at hand can be distinguished from *Ferdinand* in that Jamison was not a child adopted while in the custody of or due to action of the Appellant. He was adopted in a private adoption that the DHHR was not a party to and should not have been named a party to, as Jamison was not in their custody. Following the September 18, 1998, hearing, whereby the lower court placed the Appellee in the physical and legal custody of his grandparents, the Appellant played no role in the pending adoption. (pp. 2-3.) This is evident insofar as the Appellant was not noticed, as a party or otherwise, about the termination of the father's parental rights. (Notice of Hearing April 20, 2000). The Appellant was not noticed and did not participate in the Petition to terminate parental rights. (September 19, 2000 Order). In fact, by their own admission in the Petition for adoption the Appellee's stated that they "... were awarded the permanent physical, financial, and legal full care, custody, control and guardianship of Jamison Nicholas ... on November 20, 1998." (Petition I, p. 1). In addition, the lower court found that this was a private adoption, and the Appellant was not a party. (December 5, 2005, Order, p. 4). The Appellee was never 'placed' with a family in hopes that he would be adopted. Rather, he remained in the home of his grandparents where he had previously resided prior to the death of his mother.

The lower further court also used *Ferdinand supra* to determine that although his special needs were not evident at the time of his adoption, Jamison subsequent diagnosis would qualify him as such. The *Ferdinand* Court held that according to 42 U.S.C. § 673(c),

the child in question would have qualified as a special needs child by virtue of her race. *Id* at 404. They went on to state that "[T]he fact, therefore, that Nina's special education needs may not have been evident at the time of her adoption is not grounds for disqualification." *Id* at n.6. The Court was not saying that if at any point a child develops special needs, they would then qualify for a subsidy. Rather, they were saying that this particular child qualified due to her race, so, therefore, her educational limitations played no part in determining her eligibility to receive a subsidy.

Finally, the *Ferdinand* Court made its determination based on applicable Rhode Island law. The West Virginia Code makes no provision for individuals to qualify for adoption assistance after they are adopted. West Virginia Code § 49-2-17(b) states in part that "... the department shall provide either medicaid or other health insurance coverage for any special needs child for whom there is an adoption or legal guardianship assistance agreement . . ." (*emphasis added*). This plain and unambiguous language requires an application of adoption assistance to be made before the consummation of the final adoption. As indicated previously, no such agreement exists.

According to a Policy Announcement by the U.S. Department of Health and Human Services Administration on Children Youth and Families, although improbable, it is possible for a child of a private adoption to qualify for an adoption subsidy. (Log No.: ACYF-CB-PA-01-01, January 23, 2001, p. 12). However, according to this same policy announcement, it is not the duty of the DHHR to look for such children.

"[T]he State Title IV-B/IV-E agency is required to actively seek ways to promote the adoption assistance program However, in circumstances where the State agency does not have responsibility for placement and care or is otherwise unaware of the adoption of a potentially special needs child, it

is incumbent upon the adoptive family to request adoption assistance on behalf of the child. It is not the responsibility of the State or local agency to seek out or inform individuals who are unknown to the agency about the possibility of Title IV-E adoption assistance for special needs children who are also unknown to the agency. “

(Emphasis added) Id at pp. 12-13.

When physical and legal custody of Jamison was given to the Appellee's in September 1998, he had yet to be diagnosed with any medical problems. Since the Appellant was no longer a party to his case, they could not have known that between then and his adoption he was diagnosed with Depressive disorder, NOS and ADHD. (Letter from Debra Shultz, M.D., United Health Professionals). Further, he was not diagnosed with Asperger's Disorder until April 2004, well after he was adopted. (Letter from Thomas D. Linz, Ph.D., Marshall University Psychiatric Associates). The Appellant does not have the ability to review every adoption in the state of West Virginia to determine whether or not a child would qualify for an adoption subsidy.

Based on the facts presented in this appeal, and the requirements of the federal Adoption Assistance Program, the trial court erred when it required the Appellant to enter into an adoption assistance agreement when not a party to a private adoption.

IV. CONCLUSION

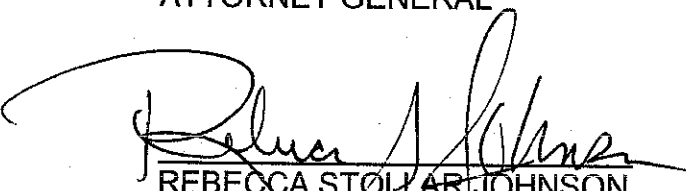
WHEREFORE, based on the foregoing, the Appellant respectfully requests that this Court overturn the finding by the lower court, which granted Jamison Nicholas C. (now M.) a medical card.

Respectfully Submitted,

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

A handwritten signature in dark ink, appearing to read "Rebecca Stollar Johnson", is written over the printed name.

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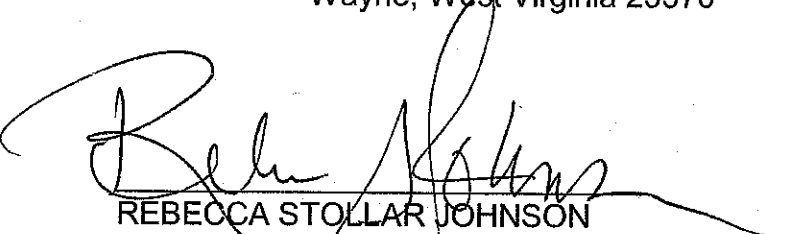
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CERTIFICATE OF SERVICE

I, Rebecca Stollar Johnson, Assistant Attorney General, and counsel for the West Virginia Department of Health and Human Resources, do hereby certify that on this 19th day of June, 2006, I served a copy of the foregoing "**BRIEF OF APPELLANT**" by United States Mail, postage prepaid, addressed as follows:(s):

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